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No. 80-1912

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

PHILIP CHARLES TOUBUS,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF MARIN and STATE OF CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

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QUESTIONS PRESENTED

1. Where officers enter the home and make an arrest without warrant, without notice, without emergency and without consent, does the consensual presence of an undercover agent at the time of the arrest satisfy the requirements of the Fourth and Fourteenth Amendments?

2. Assuming arguendo that the petitioner's arrest was illegal, must evidence obtained under a search warrant issued in substantial part because of that tainted arrest be suppressed, or are the requirements of the Fourth Amendment satisfied by excising the tainted information and testing the balance for sufficiency?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, PHILIP CHARLES TOUBUS, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District (1 Civil No. 49876) entered in this matter on January 7, 1981.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on March 11, 1981, denying a petition for hearing, are reproduced in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a right claimed under the Constitution of the United States. The petition is filed within 60 days of March 11, 1981.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.

The Undercover "Buy"

An informant, only identified as "Liz," told agents of the California Department of Justice in October of 1979 that petitioner was dealing in cocaine. P.H.T. 63.[1] On January 27, 1980 Special Agent Lauren Platt asked to arrange a buy of cocaine from petitioner and she allegedly did so by telephone on that date. P.H.T. 64. On the next day, January 28, 1980, in the presence of Bureau of Narcotic Enforcement Special Agent Brown, Liz telephoned petitioner and made arrangements to go to his home at 645 Larkspur Plaza, Larkspur, California to buy the cocaine at about 5:00 p.m. P.H.T. 25-28. The cocaine was to

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[1] The following designations have been used in this brief: P.H.T. (Reporter's Transcript of Preliminary Hearing); Pet. Writ (Petition for Writ of Mandate in the California Court of Appeal, First Appellate District.)

be purchased by Liz's cousin.

At 5:00 p.m. on January 28th Liz and State Agent Christie McCampbell knocked on petitioner's door and were admitted. The agent was introduced as Liz's cousin's girlfriend. Petitioner produced a bag of white powder and Agent McCampbell informed him that she would telephone her boyfriend from another location. She and Liz left the premises and drove a few blocks away where they met with a force of other agents, all in civilian clothes, and informed them what happened. P.H.T. 12.

About 20 minutes later Agent McCampbell, Agent Brown (who was playing Agent McCampbell's boyfriend and Liz's cousin) and Liz returned to petitioner's residence and were again admitted by petitioner. Agent Brown examined the alleged cocaine and then told the informant to leave the apartment in order to

get a scale to weigh it. P.H.T. 13. This was a pre-arranged signal for the agents waiting outside of the apartment to enter and arrest petitioner. P.H.T. 14.

The Arrest

A few minutes later the remaining agents entered without knocking and arrested petitioner and the undercover officer. P.H.T. 14-16. At no time did the undercover agents identify themselves in the presence of the petitioner because they wished to continue their undercover identities. P.H.T. 14; 32-33.

None of the arresting officers had a warrant for the petitioner's arrest in his home or elsewhere. P.H.T. 19. The informant and Agent McCampbell had left the front door to petitioner's apartment ajar "an inch maybe." P.H.T. 16. Agent

McCampbell testified at the preliminary hearing that there was no knock and that the officers simply identified themselves as police officers "simultaneously with coming through the door . . ." P.H.T. 16-17. The actual arrest was made by Agent Lauren Platt. P.H.T. 57-58.

One of the most important things to be noted in the present factual situation is how simple it would have been for the state agents to have obtained a warrant for petitioner's arrest in his home.

On the day before the arrest in this case, state narcotics agents had listened to the informant Liz make a telephone arrangement with petitioner to purchase cocaine at his home. The very action contemplated should have alerted the agents that an arrest warrant would in all likelihood be required. The co-

caine purchase was confirmed by Liz the next day and then both Liz and an undercover agent saw what appeared to be cocaine in petitioner's apartment on their first visit. This occurred on a Monday afternoon. They left petitioner's apartment and consulted other agents close by and informed them of what they had seen. About 20 minutes later Liz and two undercover agents again entered petitioner's apartment and about 10 minutes after that the arrest was made. At no time did petitioner exhibit any nervousness or intention to leave his apartment or terminate the transaction.

It is obvious that at several stages in this procedure there was sufficient probable cause to obtain an arrest warrant. In neither the trial court nor the Court of Appeal has the prosecutor argued exigent circumstances or emergency or even attempted to argue

that obtaining a warrant might have interfered with the arrest or threatened the officers' safety.

The Search

The arresting officer, Agent Platt, then swore out a search warrant affidavit reciting the fact of the warrantless arrest of petitioner and his observation at the time of the arrest of a plastic bag containing approximately 14 ounces of "white powdery substance which appeared to be cocaine." The affidavit also recited that during a cursory search of the other rooms of the apartment for other possible suspects he observed certain paraphernalia associated with illicit drug sales. A search warrant was issued and a search ensued in which some additional evidence sought to be used against petitioner was obtained.

The Proceeding in the Trial Court

Petitioner is the defendant in case No. 7436 pending in the Superior Court of the State of California, County of Marin. Petitioner is charged with violation of three felonies involving alleged possession of illegal drugs in violation of the Health and Safety Code of the State of California.

On May 1, 1980, petitioner filed a motion to suppress all of the tangible evidence seized pursuant to the illegal arrest and subsequent search, on the ground that said evidence was obtained in violation of petitioner's constitutional rights. (Pet. Writ, Exhibit "C") On May 29, 1980, petitioner's motion came on for hearing. By stipulation, the transcript of the evidence at the preliminary hearing was introduced in evidence and no further testimony was taken. (Pet. Writ, p. 4) On June 6,

1980, petitioner's motion to suppress the evidence was denied. (Pet. Writ, Exhibit E).

The proceedings in the trial court have been stayed by order of the Court of Appeal pending a final decision of this Court.

Proceedings in the Appellate Court

On June 18, 1980, petitioner filed a Petition for Writ of Mandate in the California Court of Appeal, First Appellate District.

On January 7, 1981 the Court of Appeal, reaching the merits of the Fourth Amendment contentions, denied the petition, affirming the trial court's refusal to suppress the evidence.

The Court of Appeal ruled that the requirement that a warrant be obtained for an arrest within the home absent exigent circumstances or informed consent

is "inapplicable" when an undercover police agent is already in the home at the invitation of the homeowner. For the same reason, the Court of Appeal found that the knock-notice requirement was inapplicable. In the alternative, the Court of Appeal ruled that the search was valid under the warrant obtained after the arrest because the affidavit, when stripped of the evidence obtained as the result of the arrest, would still be sufficient for the issurance of a search warrant. The Court of Appeal also ruled that the search warrant was not overbroad in its authorization, contrary to petitioner's assertion. Justice Poché concurred only in the latter two holdings.

On March 11, 1981, the California Court voted to deny a petition for hearing.

REASONS FOR GRANTING WRIT

I

THE WARRANT CLAUSE DOES NOT ALLOW A WARRANTLESS HOME ARREST BY POLICE OFFICERS JUST BECAUSE THE HOMEOWNER HAD PREVIOUSLY CONSENTED TO THE ENTRY OF AN UNDERCOVER OFFICER WHO DOES NOT PARTICIPATE IN THE ARREST

In Payton v. New York (1980) 445 U.S. 573, this Court answered the question left open by United States v. Watson, 423 U.S. 411: "Whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest."

> We . . . hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. (445 U.S. at 576.)

In Payton, this Court analyzed in detail and with enlightening clarity the

history and purposes of the protection afforded by the Warrant Clause of the Fourth Amendment. Noting "the zealous and frequent repetition", at the time of this country's birth, "of the adage that a man's house is his castle" (445 U.S. at 596) and noting that nowhere is an individual's privacy "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home", this Court declared:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. (445 U.S. at 590, emphasis added.)

Moreover, this Court held that the warrant requirement as a precondition to a felony arrest in the home, was a "constitutional command that we consider to be unequivocal." (445 U.S. at 602) See

also, Steagald v. United States, ____ U.S. ____ (April 21, 1981) slip opinion, pp. 7-8 and cases cited.

However, applying this standard to cases involving undercover agents consensually in the home, various state and federal courts are presently interpreting this unequivocal constitutional command quite equivocally.

This issue is one which continually confronts the courts at all levels of the state and federal judiciary. The facts leading to the challenged entry, arrest and search "are typical of the plethora of narcotics prosecutions which fill the pages of modern legal history." (United States v. Velasquez, 626 F.2d 314, 315 (3rd Cir. 1980).)

The court below found an easy detour around this Court's clear holding that absent exigent circumstances a warrantless arrest in the home violates

the Warrant Clause. California avoids the Warrant Clause simply by rendering the "unequivocal command" of the Fourth Amendment inapplicable to cases where "an agent is invited by a suspect to enter." Nor does it matter that, as in our case, the undercover agent did not participate in the arrest. Rather than attempting to justify the warrantless arrest in our case in terms of exigent circumstances (conceded not to be present), California allows consent to an undercover agent's entrance to mean a general waiver of the Fourth Amendment rights guaranteed by Payton. A remarkable--and dangerous--constitutional leap.

The decision of the court below contains no reasoning to support its result; nor does it contain any policy discussions as to why the Warrant Clause could not serve its beneficial purposes

even in a situation where there is an undercover officer in the home. The importance of security in the home as detailed in Payton would seem to call for protective efforts rather than the creation of new and dubious exceptions to validate careless and totally unnecessary police action.[2]

This exception, carved out without precedent or reason, not only does violence to constitutional principles but has the potential for creating abuses and strategies to circumvent the requirements of Payton.

The endless variations of police practices involving undercover agents

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[2] Petitioner does not dispute the existence of probable cause to make an arrest. Nor could it be disputed by respondents that this probable cause existed for at least several hours before the warrantless arrest. Cf. Steagald v. United States, ___ U.S. ___ (April 21, 1981) slip opinion p. 17.

will produce a myriad of questions for this Court. When does the warrant requirement cease to exist when arresting a person in his home? If an undercover officer, gaining entry into a home under the pretext of consumating an illegal transaction, personally arrests the suspect, is a warrant needed? If the agent leaves shortly before the police make the warrantless home arrest, has the constitutional protection been waived? What if the undercover agent is a paid informer rather than a full time police officer?

The constitutional questions presented by the common practice of utilizing undercover agents to ferret out crime have been answered differently when confronted by the various state and federal courts. In our case the court below has decided that in California once an undercover agent is invited into

a home neither warrant nor exigent circumstances are required when a subsequent entry and arrest are carried out by other officers. The inference is clear: Consent given to the entry of an undercover officer is a blanket waiver of one's Fourth Amendment rights as to all other officers.[3] No arrest warrant is needed, no exigent circumstances need be shown, and no notice of entry need be given.

The lower court, in declaring Payton inapplicable, erroneously relies upon the statement of this Court in Hoffa v. United States, 385 U.S. 293, 302, that the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily

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[3] If the homeowner invites the undercover agent to "look around" is this also a waiver of his right to be protected against a warrantless search by any and all other officers?

confides his wrongdoing will not reveal it." Petitioner does not challenge this rule but points out that it does not create another exception to the constitutional requirement of a warrant for a home arrest. It has no application in this case. It could have some application where the undercover officer himself makes the arrest,[4] but not where other officers, who easily could have obtained an arrest warrant from a magistrate, enter and make the arrest.

Other courts, in the light of Payton, see the issue more clearly. In

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[4] Any arrest made by an undercover agent himself almost certainly would involve exigent circumstances as the situation might radically change from the time he left and obtained an arrest warrant. In our case, the waiting agents had adequate opportunity (and probable cause) to obtain an arrest warrant between the entries of the undercover agents, if not before the first entry. Cf. Steagald v. United States, ___ U.S. ___ (April 21, 1981) slip opinion, p. 17.

United States v. Velasquez, supra, an undercover agent who had previously purchased illegal drugs from appellant Velasquez, arranged for a subsequent purchase of drugs in Velasquez's home. Additional federal agents accompanied him to the residence. No arrest or search warrants were obtained. On a prearranged signal from the undercover source the other officers were to enter the home to accomplish the arrest. The facts, therefore, like the case at bench, are similar to the many "buy-bust" narcotics prosecutions throughout the country today. (The only difference between Velasquez and the instant case is that in the former, the undercover agent had not actually seen the illegal substance since it was in a brown paper bag, although the actual "sale" had been negotiated. The outside officers broke

in before he had seen the contents of the bag. However, the undercover officer had just purchased illegal drugs from Velasquez the day before and certainly had probable cause to make an arrest.)

The court in Velasquez, rather than declaring Payton inapplicable as the lower court did here, instead cites the Payton requirement that a warrantless arrest in the home requires exigent circumstances, and correctly focuses on the fundamental constitutional question: Are there exigent circumstances excusing the requirement of a warrant when an arrest is made in the home?

The question whether or not the consensual entry of an undercover agent creates an additional exception to the warrant requirement can be phrased in another way: Does the "invited" entry of an undercover agent into one's home

unknowningly waive the occupant's expectations of privacy not only as to that undercover officer, but also to a class of persons whose very existence is unknown?

This issue has been faced by the courts in cases involving state and federal "knock-notice" requirements. In State v. Dugger (Wash.App. 1974), 528 P.2d 274, an undercover officer was consensually in a home where illegal gambling was taking place, when by prearranged plan other officers entered the home without knocking or announcing their identity or purpose. The officers had not obtained either a search warrant or arrest warrant. The undercover officer took no part in the arrest.

The state asserted that the presence of the undercover officer inside the premises prior to the entry of the other officers excused compliance with

the knock-notice statute. The Washington court, in disagreeing with the state's contention, addressed the question of whether an invitation to an undercover officer to enter a home, when that officer has legal authority to arrest, extends those same rights to other officers who subsequently enter and arrest the suspect. The court rejected any "waiver of privacy" theory and held that the mere presence of an undercover officer whose status is unknown to the occupants does not waive legal requirements for entry and arrest by other officers. (528 P.2d at 277.) Rather, the court, in reasoning equally applicable to warrantless arrest cases, considered whether exigent circumstances were present to excuse compliance with the knock-notice requirements, concluded there were none, and ordered suppressed evidence seized as a result of the illegal

entry.

The Florida courts have reached the same constitutional conclusion in similar circumstances. In Hansen v. State of Florida, (Fla.App. 1979), 372 So.2d 1003, again the court was confronted with the archetypal "buy-bust" situation. Two undercover officers gained entry into a dwelling by posing as potential purchasers of marijuana, and other officers, on prearranged signal, entered the residence through an unlocked door, arrested the occupants and seized the marijuana. The court held this contravened the state knock-notice statute and in the absence of exigent circumstances the arrest and seizure of evidence were unlawful. As did the Washington court, the Florida court expressly rejected any "implied invitation" theory:

> The officers who entered without "knocking and announcing" made the arrests and seized the contraband. These officers had no implied invitation to enter the premises . . . . Rather, they were entering the premises to effectuate an arrest for a felony and could only do so after announcing their authority and purpose. (372 So.2d 1005.)

See also, State v. Roman, (Fla.App. 1975), 309 So.2d 212.

Petitioner notes that a line of cases coming to a different conclusion exists, indicating that the lawful presence of an undercover officer precludes any argument that later entries violate the privacy of occupants, and negates any knock-notice requirements, without any consideration of exigent circumstances. (See United States v. Glassel, 488 F.2d 143 (9th Cir. 1973); United States v. Bradley, 455 F.2d 1181 (1st Cir. 1972); Grzesrowski v. State, 343 N.E.2d 305 (Ind. 1976); People v. McCoy (1974)

40 C.A.3d 854.)

It is apparent that further guidelines from this Court are needed on this common and fundamental issue. Petitioner requests that the Court grant the petition in order to resolve this continuing source of disputes in lower courts concerning the Warrant Clause.

II

THE FOURTH AMENDMENT DOES NOT ALLOW A HOME ENTRY BY POLICE WITHOUT ANNOUNCEMENT AND NOTICE JUST BECAUSE THE HOMEOWNER HAD PREVIOUSLY CONSENTED TO THE ENTRY OF AN UNDERCOVER AGENT

In the case at bench, the facts clearly disclose not only the absence of an arrest warrant, but a failure on the part of the officers entering petitioner's home to knock and announce their purpose. Such an action was in contravention of the California "knock-notice" statute, a statute similar to those enacted in most states and to that of the

United States Code. (18 U.S.C. § 3109.)

The knock and announce rule codified in these statutes was known at common law. (In Semayne's Case, 77 Eng.Rep. 194, 195-196 (K.B. 1603). At least four members of this Court concluded in Ker v. California, 374 U.S. 23, that the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, absent certain exigent circumstances.

Justice White, in his dissent in Payton v. New York, supra, joined by the Chief Justice and Justice Rehnquist, confirms the view that the knock and announce rule is a constitutional standard and a restriction on arrests in the home absent exigent circumstances. (445 U.S. at ____.)

The answer to the question whether an undercover officer already in the home vitiates this constitutional knock

and announce requirement as applied to the subsequent entry and arrest by other officers, rests upon the same principles and arguments regarding the need for warrants for an arrest in the home. Does the presence of such an officer place the situation entirely outside the Fourth Amendment, or must a court consider whether exigent circumstances were present? As the same argument is applicable, petitioner incorporates part I of his Petition, supra, at this point.

III

THE EVIDENCE SOUGHT TO BE SUPPRESSED CANNOT BE ADMITTED ON THE INDEPENDENT GROUND THAT EVIDENCE NOT BASED ON THE ARREST WAS SUFFICIENT TO SUPPORT A SEARCH WARRANT BECAUSE SUCH A RULING ENCOURAGES POLICE LAWLESSNESS AND VIOLATES FOURTH AND FOURTEENTH AMENDMENTS

In part III of its opinion the Court of Appeal (Appendix), assuming arguendo that petitioner's arrest in his

apartment was illegal, ruled that the evidence seized in petitioner's apartment in the subsequent execution of a search warrant would be admissible at petitioner's trial because the affidavit contained observations of undercover agents gathered independently of the illegal arrest which would be sufficient to support the magistrate's finding of probable cause to believe that contraband was present. There is no question that the affidavit also contained substantial incriminating facts viewed by the arresting officer in the course of the illegal arrest in that he observed in the apartment a plastic bag containing approximately 14 ounces of a white powdery substance which appeared to be cocaine and saw devices generally found in locations where illicit drug sales are being made. There is also no question that the magistrate relied upon

these illegally-obtained facts in authorizing the warrant. Without the latter facts, no one knows whether the magistrate would have issued the warrant.

There is presently no accepted standard for determining the Fourth Amendment validity of a search warrant based upon a tainted affidavit. The case of James v. United States (D.C. Cir. 1969) 418 F.2d 1150, 1151-1152 set up a proposed test based upon the court's interpretation of the "independent source" test articulated in Wong Sun v. United States (1963). 371 U.S. 471. Under James, supra, if the untainted information contained in an affidavit is sufficient to establish probable cause considered by itself, the search is validated and the exclusionary rule need not apply to the evidence seized. This Court has approached the issue in two footnotes in United States

v. Giordano (1974) 416 U.S. 505, a case involving an improperly authorized telephone tap and two subsequent installations of "pen registers" to monitor the numbers called from that telephone. The Court affirmed the lower court's suppression of all of the evidence thus obtained even though the pen register orders were obtained by applications containing information not derived from the illegal wire taps. In footnote 2 the Court states:

> We therefore agree with the Court of Appeals, for the reasons discussed in part IV, infra, that evidence gathered under the wire tap and pen register extension orders is tainted by the use of unlawfully intercepted communications under the October 16 order to secure judicial approval for the extensions and must be suppressed.

In footnote 19 the Court states that the illegally monitored conversations should be considered a "critical element" in

extending the pen register authority and therefore evidence obtained by the latter authority must also be suppressed. Several other courts have read Giordano as establishing a constitutional requirement that a search warrant affidavit containing significant tainted information requires that the entire warrant be declared illegal. See Commonwealth v. Hall (1975) 336 Mass. 790, 323 N.E.2d 319; United States v. Langley, 466 F.2d 27 (6th Cir. 1972).

The court in Commonwealth v. Hall, (supra at p. 323) clarified the definition of "critical element":

> [A]n impressive or important element in relation to the totality of material put before the court, even though the rest would independently merit approval."

Thus, the James test, which promotes the excision of tainted material, has given way to a test which scruti-

nizes the extent of the illegal information. If more than a minor portion of the affidavit is tainted the court should not have to engage in speculation, the warrant should be ruled invalid, and the evidence gathered thereunder suppressed. See Langley, supra; United States v. Nelson, 459 F.2d 884, 889-890 (6th Cir. 1972).

However, the courts fail to agree on the effect of Giordano's critical element analysis, with some courts interpreting that case as merely applying a "but for" test to affidavits. United States v. Marchland, 564 F.2d 983, 994 (D.C. Cir. 1977).

The analysis of Nelson, supra, and Langley, supra, is the better one because if the courts merely excise tainted material the police are tempted to make illegal searches to bolster otherwise borderline affidavits. Under the

James approach they are no worse off having ignored the Fourth Amendment protection against illegal searches and seizures afforded individuals.

The "critical element" approach is supported by other state precedent. In Raymond v. Superior Court (1971) 19 C.A.3d 321 the California Court of Appeal held that information acquired by an illegal search could not be excised from the search warrant affidavit and the remainder of the affidavit tested for adequate support for the search warrant. Justice Friedman noted that the reviewing court could not ignore averments of the affidavit which formed "substantial ingredients of the probable cause found by the magistrate." (19 C.A.3d at 327.) Since the illegal search "formed a substantial immovable part of the affidavit upon which the search warrant was issued" the search

warrant was "come at" by exploitation of the illegality and its products had to be suppressed. (19 C.A.3d at 327.)

The holding of the Raymond case and of those cases following the "critical element" analysis of Giordano, supra, is the only approach that adequately insures against police illegality. Without the direct observations of the arresting officer there is simply no telling what the magistrate would have done with regard to the application for the search warrant. In the present case illegal observations were substantial. As Raymond states at p. 327:

> A reviewing court should avoid exercises of discretion and factual determinations to which the original tribunal has never addressed itself.

Obviously the search warrant in this case, as in Raymond, was tainted with the illegality of the arrest and "come

at" by exploitation of the illegality, requiring the suppression of evidence obtained under its authority.

Professor LaFave's analysis of the problem is in accord with the Raymond case. He writes:

> If the illegally-obtained information is merely stricken and the balance of the affidavit assessed as if the tainted information had never been included, then police are tempted to make illegal searches to bolster what would otherwise be borderline affidavits. If the illegality is never uncovered, then they have a warrant solidly based on probable cause where otherwise their warrant application might have been rejected. If, on the other hand, the illegality does come to light on the subsequent motion to suppress, the police are no worse off than if they had not made the illegal search. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, § 11.4, Vol. 3, p. 651.

The holding in People v. Cook (1978) 22 C.3d 67 is strikingly parallel. The

California Supreme Court had approved in a previous case, Krauss v. Superior Court (1971) 5 C.3d 418, a police "confirmatory" illegal search to verify information from a citizen-informant so long as the information contained in the "confirmatory search" was not placed in the search warrant affidavit and not considered by the magistrate who issued the search warrant. This holding was re-examined and found to be unwise in Cook since the Krauss holding had taught police that they had nothing to lose by making illegal searches to verify information reaching them by legal means. The Court stated:

> After Krauss, a police officer need not rely solely on lawfully obtained probable cause; he can instead achieve "certain cause" by conducting an unlawful confirmatory search, thus saving himself the time and trouble of obtaining and executing a warrant if he does not find the evidence. He

> can safely engage in this conduct because Krauss teaches him that if the evidence does turn up in the course of the illegal search, he will still be allowed to seize it later in a second "search" under color of a warrant. The latter prospect thus gives him strong incentive to proceed with the warrantless entry. Yet every time he fails to find the suspected evidence, he also has invaded the privacy of a citizen innocent of any wrongdoing. The second "search" is therefore constitutionally unreasonable because it significantly contributes to increasing the risk of such invasions of privacy. [22 C.3d at 98-99.]

The lower court's opinion in this case would have been exactly the result condemned in Cook. Police officers believing that their probable cause to obtain a warrant was weak could bolster their affidavits by illegal activities and would have nothing to lose thereby since the only penalty would be the excision of material illegally obtained and the

testing of the warrant on the remaining allegations. Just as in Cook, the risk to invasions of privacy of innocent persons is substantially increased by such practices. Thus, there must be some standard that takes into consideration the significance of the illegal material. If a substantial portion of the affidavit recites facts inextricably linked to police conduct violative of the Fourth Amendment, the court's scrutiny should be directed toward analyzing the taint of that material, not simply the substantiality of the remaining information after excision.

Whatever this Court's decision may be as to the constitutional standard for the analysis of tainted affidavits, a clear pronouncement of such a standard and further guidance from this Court is required.

IV

CONCLUSION

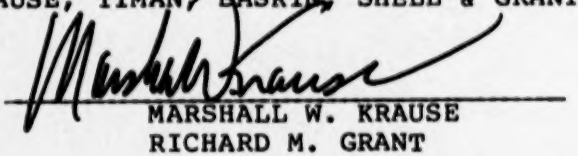
It seems clear that the presence of an undercover agent in the home should not create an exception to the Payton requirement under all circumstances. The issue is one which has been much disputed and will continue to be so until this Court resolves its constitutional parameters. The effect of the tainted search warrant affidavit is also an unsettled constitutional issue which can be resolved in this case.

For these reasons, a Writ of Certiorari should be granted.

DATED: May 10, 1981

Respectfully submitted,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By 

MARSHALL W. KRAUSE
RICHARD M. GRANT

Attorneys for Petitioner

(APPENDIX FOLLOWS)

APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil No. 49876
(Sup.Ct.No. 7436)

PHILIP CHARLES TOUBUS,
Petitioner,

vs.

SUPERIOR COURT, MARIN COUNTY,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Philip Charles Toubus has petitioned for a writ to compel respondent superior court to suppress evidence (Pen. Code § 1538.5, subd. (m)) and consequently to set aside (Pen. Code § 999a) an information charging him with possession for sale of cocaine (Health & Saf. Code, § 11351), trafficking in cocaine (Health

§ Saf. Code, § 11352), trafficking in amphetamines (Health & Saf. Code § 11377, subd. (a)).

The motion to suppress was submitted on the preliminary hearing transcript, which showed that an informant named Liz and an undercover agent of the Department of Justice, Christie McCampbell, went to petitioner's apartment in Larkspur to buy cocaine. The agent was introduced as the girlfriend of informant's cousin. Previous telephone conversations had established that the informant's cousin was going to purchase the cocaine. Petitioner produced a bag of white powder; after viewing a demonstration that the powder was cocaine, McCampbell and Liz left the residence to get agent Ken Brown, the pretended purchaser. They met with three agents and reported on the situation. McCampbell, Liz and Brown returned to the apartment where Brown was introduced as Liz' cousin.

Brown then tested the cocaine and told Liz to go out and get a scale to weigh the powder. Her departure was actually a prearranged signal to Agent Platt, the officer in charge of the investigation, to enter and arrest petitioner.

Platt and two other officers who entered to make the arrest were in civilian clothes. The door had been left ajar and the officers came in without knocking. As they came through the door, they identified themselves as police officers. They arrested petitioner and also handcuffed Brown in order to hide his identity as a police officer. The arresting officers then made a cursory search of the residence to determine if there were any other people there.

Platt then obtained a warrant to search the premises for cocaine, narcotic paraphernalia, articles tending to establish identity and "any papers or writings,

records that evidence dealings in controlled substances including, but not limited to address books, ledgers, lists, notebooks, etc."

While Platt was obtaining the search warrant, Brown remained to secure the premises; he later assisted Platt in executing the wararnt and seizing the contraband which is the subject of the pending charges. This included the cocaine which Brown had tested in the living room as well as pills and more cocaine found in a yellow bag in the front bedroom.

Petitioner's argument includes six propositions: (1) since he was arrested in his own residence without the benefit of a judicially approved arrest warrant, his arrest is "presumptively unreasonable and illegal under both the state and federal Constitutions," citing Payton v. New York (1980) 445 U.S. 573, and People v. Ramey (1976) 16 Cal.3d 263; (2), there

are no "exigent" circumstances to remove the case from the proscriptions of Payton and Ramey; (3), the arrest was in any event unlawful since the officers who actually made the arrest did not comply with the knock-notice requirement of Penal Code section 844; (4), therefore, the "fruits" of that arrest are tainted and must be suppressed, citing Wong Sun v. United States (1963) 371 U.S. 471; People v. Cook (1978) 22 Cal.3d 67; People v. Solario (1977) 19 Cal.3d 760; and People v. Negrete (1978) 82 Cal.App.3d 328; (5), the fruits of the illegal arrest include the observations of the illegally arresting agent; and (6), the search warrant, "based upon the arrest and seizure" of the petitioner, is invalid and everything seized thereunder must be suppressed.

I

Was The Warrantless Arrest Of Defendant Unconstitutional?

Petitioner contends, relying on Payton v. New York, supra, 445 U.S. 573, and People v. Ramey, supra, 16 Cal.3d 263, that his arrest without a warrant in his own home was presumptively unreasonable and illegal. In Payton and Ramey, a crime had been committed. The police developed probable cause to arrest a suspect and entered the suspect's residence to arrest him without first obtaining a warrant. The United States Supreme Court in Payton and the California Supreme Court in Ramey, held it is the entry into a home that is the evil condemned by the Fourth Amendment. In Payton, Justice Stevens quotes from Judge Leventhal who, in Dorman v. United States (1970) 435 F.2d 385, after first noting that arrests in public places are valid, states: "'A greater burden is placed on officials who enter a home or dwelling

without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.'" (Payton v. New York, supra, at p. 587, emphasis added.) The Supreme Court then quoted approvingly from United States v. Reed (1978) 572 F.2d 412: "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances. . . ." (Payton v. New York, supra, 445 U.S. at pp. 588-589, emphasis added.)

Likewise, The California Supreme Court in Ramey said: "we believe that the Fourth Amendment prohibits a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant." (People

v. Ramey, supra, 16 Cal.3d 263 at pp. 274-275, emphasis added.) But this does not imply that warrantless arrests in general must be justified by exigent circumstances excusing the lack of a warrant, and the Supreme Court expressly limited its holding to warrantless entries of dwellings for the purpose of making arrests within those dwellings. (People v. Ramey, supra, 16 Cal.3d 263 at p. 275, fn. 5.)

Payton and Ramey are inapplicable where an agent is invited by a suspect to enter. (People v. Evans (1980) 108 Cal.App.3d 193, 196.) Petitioner argues that the entry here was not consensual since it was obtained by subterfuge. The argument is factually unfounded. Petitioner admitted McCampbell and Brown to sell them cocaine. McCampbell and Brown entered to purchase cocaine from him. There was no ruse. The Fourth Amendment does not protect "a wrongdoer's misplaced belief that

a person to whom he voluntarily confides his wrongdoing will not reveal it." (Hoffa v. United States (1966) 385 U.S. 293, 302.)

II

Does Failure To Comply With Penal Code Section 844 Invalidate The Arrest?

Petitioner contends that the arrest was invalidated by failure to comply with Penal Code section 844. Section 844 provides in pertinent part: "To make an arrest . . . a peace officer, may break open the door or window of the house in which the person to be arrested is, . . . after having demanded admittance and explained the purpose for which admittance is desired." The purposes of the statute are: "(1) The protection of the privacy of the individual in his home; (2) the protection of innocent persons who may also be present on the premises where an arrest is made; (3) the prevention of situations which are conducive to violent confrontations between the occupant

and individuals who enter his home without proper notice; and (4) the protection of police who might be injured by a startled and fearful householder." (People v. Solario, supra, 19 Cal.3d 760, at p. 763.) None of those purposes would be served by requiring compliance with the statute when a crime is in progress.

Here, there was no occasion to protect the privacy of petitioner in his home since a peace officer who already possessed probable cause to arrest was already in that home; there were no innocent persons on the premises who needed protecting; it was unlikely the entry without notice would provoke a violent confrontation; and with two officers already present on the premises it is highly unlikely that the police would be in any danger from actions taken by a fearful defendant. The officers who came in to make the arrest acted to assist their fellow officers who were lawfully

inside the apartment and who had probable cause to make an arrest for a felony then being committed in their presence; that the officers chose to seek the help of their colleagues in accomplishing the arrest in their presence is not improper. (Cf. People v. Cornejo (1979) 92 Cal.App.3d 637; People v. McCoy (1974) 40 Cal.App.3d 854.)

III

Was The Search Warrant "Based Upon" Petitioner's Illegal Arrest?

Petitioner contends that asserted unlawfulness of the arrest vitiates, as support for the search warrant, information obtained at the time of the arrest. The officer who actually made the arrest related in his affidavit that he saw "a plastic bag containing approximately 14 ounces of white powdery substance, which appeared to be cocaine, on a table in the living room." He saw an "Ohaus scale" in the front bedroom, and stated that he "has

seen Ohaus scales used as a weighing device on many occasions in which illicit drug sales were being made." Also set out in the affidavit are the personal observations of agents McCampbel and Brown, whose presence in the residence at the time of their observations was concededly lawful.

Although we hold otherwise, assuming arguendo that the affiant's observations were the fruits of an unlawful arrest and must be excluded, is the warrant thus rendered invalid? The question is whether, considering only the personal observations of McCampbell and Brown, was there a substantial basis for concluding that contraband was to be found on petitioner's premises. (People v. Hill (1974) 12 Cal.3d 731, 759, citing Theodor v. Superior Court (1972) 8 Cal.3d 77, 100-101, fn. 14.)

The affidavit showed, without reference to any observations of the arresting officer, that (1) agent McCampbell went to

the home of petitioner; (2) she was admitted by him; (3) she was shown approximately one pound of white powdery substance which petitioner told her was cocaine; (4) she left and immediately returned with fellow-agent Brown, who was to purchase the cocaine; (5) both were admitted by the defendant; (6) Brown tested the powder to verify that it was cocaine; (7) the test was positive; and (8) Brown was qualified to make the test. This competent evidence was sufficient to support the magistrate's finding of probable cause to believe that contraband was present. The affiant's informants (fellow agents) spoke from personal knowledge concerning their actions and observations (see Aguilar v. Texas (1964) 378 U.S. 108), and affiant gained all of his information through "official channels" (see People v. Ruster (1976) 16 Cal.3d 690). We conclude that the warrant was valid whether or not

the arrest was lawful.

IV

Should The Seized Pills Be Suppressed As Beyond The Warrant's Scope?

Contraband pills (methaqualone, amphetamine, methylenedioxy amphetamine), not mentioned in the warrant, were seized at the place authorized to be searched. There is no evidence suggesting that the police were not acting in good faith in executing the warrant. It was proper for them to seize the additional contraband which they found. (Skelton v. Superior Court (1969) 1 Cal.3d 144, 157.)

V

Is The Search Warrant Unconstitutionally Broad and Vague?

Petitioner attacks the part of the warrant that authorizes seizure of "any papers or writings, records that evidence dealings in controlled substances including, but not limited to address books, ledgers, lists, notebooks, etc." He claims the

quoted language "is so broad and vague that it has absolutely no limits." This argument ignores the qualifying clause - "that evidence dealings in controlled substances"; each record, book, etc. seized must evidence dealings in controlled substances. As so limited, the authorization is not "overly broad."

Petitioner further complains that many items not described in the warrant were seized under color of its authority. But the law makes provision (Pen. Code, § 1540) for recovery of such items by the person entitled to possession. Suppression of contraband or other evidence which was covered by the warrant is not an available remedy.

Petitioner argues that the quoted language "substantially interferes with the defendant's right of privacy under the state and federal Constitutions." The same may be said of every warrant

authorizing law enforcement officers to search a citizen's home; hence, the constitutional requirement of a judicially authorized warrant supported by probable cause. The argument is without merit.

The alternative writ is discharged; the petition is denied.

CERTIFIED FOR PUBLICATION

Anderson, J.*

I Concur:

Christian, J.

* Assigned by the Chairperson of the Judicial Council.

I concur in the judgment and in parts IV and V of the lead opinion.

Before the entry by the three officers led by Officer Platt which gives rise to appellant's contentions, other undercover police officers were already lawfully in the residence and were eyewitnesses to the "buy." With respect to them no Ramey or knock-notice problems arise. The observations of these officers formed an independent basis for the search warrant and for the seizure of each item sought to be suppressed. Accordingly, I see no need to address the issues, particularly those of constitutional dimension, discussed in parts I, II and III of the lead opinion. Any illegality involved in the arrest by the other officers or by the entry of the residence by them is irrelevant for purposes of evaluating the denial of this 1538.5 motion.

Poche, J.

Trial Court:	Superior Court Marin County
Trial Judge:	Hon. Warren E. McGuire
Attorneys for Petitioner:	KRAUSE, TIMAN, BASKIN, SHELL & GRANT Wood Island, Suite 207 60 E. Sir Francis Drake Blvd. Larkspur, CA 94939
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Order Denying Hearing

After Judgment by the Court of Appeal
1st District, Division 4, 1 Civ. No. 49876

In the Supreme Court of the State of California

IN BANK

Toubus

v.

Superior Court, Marin

[Filed March 11, 1981]

Appellant's petition for hearing DENIED.

/s/ BIRD
Chief Justice

CERTIFICATE OF SERVICE BY MAIL
BY ATTORNEY (C.C.P. 1013A (2))

I, MARSHALL W. KRAUSE, hereby certify that I am an active member of the Bar of the Supreme Court of the United States, and not a party to the within action. That my business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. That I served three true copies of the attached Petition for Writ of Certiorari on each of the following:

County Clerk
Hall of Justice
Marin County Civic Center
San Rafael, CA 94903

George Deukmejian, Attorney General
of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on May 11, 1981 deposited in the United States mail at San Rafael, California.

All parties required to be served have been served.

Dated: May 11, 1981

MARSHALL W. KRAUSE